Supreme Court, U.S.
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No. 92-869

In The

Supreme Court of the United States

October Term, 1992

ACTIVE ERECTORS & INSTALLERS, INC.,
a Washington Corporation,

Petitioner,

v.

HOFFMAN CONSTRUCTION COMPANY OF OREGON,
an Oregon Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL E. KREGER
PERKINS COIE
1029 West Third Avenue
Suite 300
Anchorage, Alaska 99501
(907) 279-8561

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the federal court may determine if a waiver of an agreement to arbitrate has occurred.

2. Whether the Ninth Circuit Court of Appeals, on the facts before it, properly determined that Active had waived its right to arbitration of RICO claims against Hoffman.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties. Hoffman Corporation is the parent company of Respondent Hoffman Construction Company of Oregon.

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STATUTE

28 U.S.C. 1254 1

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xxii) is reported at *Hoffman Const. v. Active Erectors & Installers*, 969 F.2d 796 (9th Cir. 1992). The findings of fact, conclusions of law and partial final judgment of the district court (Pet. App. l-lx) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1992. A petition for rehearing was denied on August 20, 1992. The petition for a writ of certiorari was filed on November 11, 1992. The jurisdiction of this Court is apparently invoked by Petitioner under 28 U.S.C. 1254(1).

STATEMENT

For its Statement, Respondent incorporates pertinent portions of the decision of the court of appeals, 969 F.2d 796, at pages 797-798:

> In October 1983, Hoffman and the Kenai Peninsula Borough entered into a contract for the construction of a high school in Homer, Alaska. Hoffman then subcontracted the structural steel work to Active. The contract between Hoffman and Active provided that disputes between them that did not involve the conduct of the property owner had to be arbitrated unless they agreed otherwise.

A dispute subsequently arose among the Borough, Hoffman, and Active concerning cost overruns. In December 1984, Active sued Hoffman in federal court asserting, among others, a RICO claim. In February 1985, Active demanded arbitration against Hoffman. On April 15 of that year, Active wrote a letter to Hoffman asserting that Active was prepared to "bring[] all of the monetary claims of Active against Hoffman" arising out of the construction project in Alaska state court. (Emphasis added). The letter, however, also stated that the RICO claim, along with two other claims would remain in federal court. Active further informed Hoffman that it would dismiss its arbitration demand as soon as Hoffman assured Active that it would not change its position "that all claims against it may be tried [in state court]."

In May 1985, the district court dismissed the federal suit on the ground that the claims should have gone to arbitration instead of to federal court. We subsequently affirmed the dismissal in *Sparling v. Hoffman Construction Co.*, 864 F.2d 635 (9th Cir. 1988).

In December 1985, Active brought its Alaska state suit without any RICO claim. Thus, as of the time the state suit was initiated, the federal district court had dismissed the RICO claim (along with all the other claims), and no RICO claim had been asserted in any state court proceeding. Then, when Hoffman responded to the state suit and did not raise the issue of arbitration, Active, in March 1986, withdrew its arbitration request. The state court case was tried in July and August of 1987, and in March

1988 the superior court entered judgment in favor of Active.

We issued our opinion in *Sparling* in December 1988. We affirmed the district court on the ground that Active had agreed to submit its claims to arbitration. In January 1989, shortly after this opinion was issued, Active filed a new demand for arbitration of its RICO claim. Hoffman brought this suit in federal district court seeking declaratory and injunctive relief to prevent such an arbitration from proceeding. The district court ruled in favor of Hoffman. The court held that the RICO claim had always been arbitrable under the agreement, and that by proceeding in state court without a RICO claim, having waived arbitration to get into state court, Active was precluded from adjudicating the RICO claim in a new arbitration.

In its Statement, at page 9, Petitioner asserts that it was "effectively enjoined" and "legally barred" from arbitrating its claims as a result of a state court injunction issued on April 15, 1985 (Pet. 9; *see also* Pet. 15). To correct this inaccuracy, Hoffman sets out, verbatim, the pertinent findings of fact made by the district court below as follows:

3. The subcontract between Hoffman and Active created two categories of claims which were potentially to be resolved in two different forums. Claims "on account of acts or omissions of the owner" were required to be litigated in Alaska Superior Court. Claims directed against

Hoffman were subject to arbitration if a demand for arbitration was filed within 30 days of Hoffman's decision regarding a subcontractor's claim.

. . . .

6. Active also filed a demand for arbitration on February 4, 1985, in which it asserted claims both against Hoffman directly, pursuant to paragraph XV(d) of the subcontract, and claims "on account of acts or omissions of owner, or his representatives," pursuant to paragraph XV(b) of the subcontract.

7. Hoffman then filed a declaratory judgment action in the Alaska Superior Court at Kenai and moved to enjoin Active from pursuing the paragraph XV(b) claims in arbitration.

8. By order dated April 11, 1985, the Alaska Superior Court enjoined Active from pursuing arbitration of claims arising under paragraph XV(b) of the subcontract. A copy of the April 11, 1985 order is attached as Exhibit C to Bringman Aff. in Support of Preliminary Injunction ("Bringman Aff.")

9. The April 11, 1985 order did not, however, enjoin arbitration of claims against Hoffman under paragraph XV(d) of the contract, based upon the alleged actions of Hoffman, and Active remained free to pursue its paragraph XV(d) claims in arbitration.

Appendix li-liii; *see also* Appendix xxix-xxxi.

The remainder of Petitioner's Statement is argument. To the extent a response is required, it will be addressed in Respondent's Argument.

ARGUMENT

I. Reasons For Denying The Petition For Certiorari.

A. The Ninth Circuit Court Of Appeals' Decision Regarding Waiver Of The Right To Arbitrate Is Not In Conflict With The Decisions Of Other Courts Of Appeals

The court of appeals' decision that Active waived its right to demand arbitration does not conflict with the decisions of any other circuit court regarding the court's adjudicative authority to determine that a party has waived an agreement to arbitrate. *Shearson Lehman Hutton, Inc. v. Wagoner,* 944 F.2d 114 (2d Cir. 1991), cited by Petitioner, at 24, supports the proposition that the court may determine that a waiver has occurred. In *Shearson,* the Second Circuit analyzed whether a party's delay in seeking arbitration and its use of discovery in other federal actions resulted in waiver. 944 F.2d at 122. In so doing, the Second Circuit, like the Ninth Circuit in *Fisher v. A. G. Becker Paribas, Inc.,* 791 F.2d 691 (9th Cir. 1986), and in this case below, implicitly concluded that it has the adjudicative authority to make a determination of whether there is an enforceable right to arbitrate.

Similarly, the Eleventh Circuit's decision in *Belke v. Merrill Lynch, Pierce, Fenner & Smith,* 693 F.2d 1023 (11th Cir. 1982), is consistent with *Fisher* and with this case. In *Belke,* the Eleventh Circuit carefully analyzed whether a

waiver had occurred. As in *Shearson v. Wagoner*, the decision confirms a court's authority to determine whether a waiver has occurred. *See generally, Hoxworth v. Blinder, Robinson & Co., Inc.*, ___ F.2d ___, ___, 1992 WL 356747, 13-15 (3rd Cir. 1992) (citing cases). Stated in brief, the assertion that the Ninth Circuit's decision is in conflict with rulings in other circuits is belied by the very cases cited by Petitioner.

Conticommodities Services v. Phillip & Lyon, 619 F.2d 1222 (2d Cir. 1980), cited by Petitioner at 24, is also inapt. This case involved an untimely demand for arbitration. Untimeliness is a procedural defense. Untimeliness does not go to the existence of an enforceable agreement to arbitrate. *See Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d at 1028.

B. There Is No Conflict With This Court's Applicable Decisions.

The suggestion that the court of appeals' decision conflicts with any decisions of this Court is also mistaken. Petitioner first implies that the Ninth Circuit's decision in this case is inconsistent with this Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). *Byrd* resolved a conflict in the circuits over whether arbitrable issues may be intertwined with nonarbitrable issues triable in federal court. *Id.* The waiver of arbitration was not at issue in *Byrd*.

In *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), this Court stated that a federal court properly determines

allegations of waiver, delay, or like defenses to arbitrability. 460 U.S. at 26, 103 S.Ct. at 941. In *Moses H. Cone*, this Court cited *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 643 (7th Cir. 1981), as an illustration of a lower court's resolving doubts about arbitrability. *See Moses H. Cone*, 460 U.S. at 26, n.31, 103 S.Ct. at 941, n.31. Notably, in *Dickinson*, the Seventh Circuit addressed whether a waiver of right to compel arbitration had occurred as a result of acts inconsistent with the arbitration right. 661 F.2d at 641.

Further, in *General Atomic Company v. Felter*, 436 U.S. 493, 98 S.Ct. 1939, 56 L.Ed.2d 480 (1978) (per curiam), this Court acknowledged a lower court's discretion to make findings concerning whether a party had waived any right to arbitrate. 436 U.S. at 497, 98 S.Ct. at 1940. In sum, there is no conflict between the decision below and this Court's decisions regarding the federal court's proper determination of a wavier of the agreement to arbitrate. *See generally, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353-54, 87 L.Ed.2d 444 (1985) (a court determines the parties' intentions by applying the federal substantive law of arbitrability).

Petitioner also implies that this Court's decision in *Dean Witter Reynolds, Inc. v. Byrd* precludes a court from finding that the state court judgment had preclusive effect on the arbitration of the RICO claim. *Byrd* has no bearing on this issue and is not inconsistent with the decisions of courts which have held that a prior state court adjudication precludes re-litigation of claims in a subsequent arbitration. *See Miller Brewing Company v. Fort Worth Distributing Company*, 781 F.2d 494, 501 (5th Cir.

1986); *Telephone Workers Union of New Jersey Local 827 v. New Jersey Bell Telephone*, 584 F.2d 31, 33-34 (3d Cir. 1978); *John Morrell & Company v. Local Union 304A of the United Food & Commercial Workers AFL/CIO*, 913 F.2d 554 (8th Cir. 1990).

C. The Ninth Circuit Properly Decided A Fact-Specific Issue.

In its Sections 2, 3 and 4, pages 31-42, petitioner disputes the Ninth Circuit's application of the law of waiver to this case. There is no suggestion that the Ninth Circuit did not apply the correct law. Instead, Petitioner takes issue with the Ninth Circuit's view of the facts. The Ninth Circuit's interpretation of the facts and application of the facts to the law is correct and does not raise an important issue for review by this Court.

Active argues that the Ninth Circuit erred in concluding that Active had knowledge of the right to compel arbitration (Pet. 32). The Ninth Circuit properly concluded that Active had knowledge of the right to compel arbitration of the RICO claim since both the subcontract and a federal court had informed Active of the arbitrability of its claim. *See Hoffman Construction Company v. Active Erectors & Installers*, 969 F.2d at 798 (citing factual record).

Apparently in reference to the April 11, 1985 injunctive order, Active asserts "it knew it could not arbitrate" the RICO claim between February 22, 1985 and March 10,

1988.[1] The court of appeals' opinion below did not address the scope or the effect of the state court's injunction, perhaps because Active did not argue in its briefs below that the state court enjoined Active from arbitrating RICO claims against Hoffman. Active cannot raise an argument not presented to or decided by the court of appeals. Further, Active has misstated the effect of the state court injunction. The federal district court below analyzed the effect of the state court's April 11, 1985 injunctive order. It found:

> 9. The April 11, 1985 order did not, however, enjoin arbitration of claims against Hoffman under paragraph XV(d) of the contract based on the alleged actions of Hoffman, and Active remained free to pursue its XV(d) claims in arbitration.

Pet. App. liii. Active's "knowledge" is contradicted by the record.

Active also asserts the Ninth Circuit erred in finding that Active had knowledge of an existing right to compel arbitration because the Ninth Circuit had not affirmatively held that the statutory cause of action in RICO was arbitrable until *Lou v. Belzberg*, 834 F.2d 730, 735-736 (9th Cir. 1987). Prior to *Lou v. Belzberg*, there was, as the Ninth Circuit stated, no precedential barrier to bringing the claim. The fact that the Supreme Court had not yet definitively affirmed the arbitrability of RICO claims did not vitiate the conclusion that Active was aware its claim was arbitrable. 969 F.2d at 798, citing *Shearson/American*

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[1] February 22, 1985 is the date that the motion for preliminary injunction in state court was filed. *See* Pet. at 6.

Express, Inc. v. McMahan, 482 U.S. 220, 238-242, 107 S.Ct. 2332, 2343-46, 96 L.Ed.2d 185 (1987). Equally important, the status of the law was resolved well prior to Active's final judgment in the state court. 969 F.2d at 799. Although Active now asserts that uncertainty over the state of the law explains its election of claims against Hoffman in state court, other facts explain the decision as well. *Cf.* Transcript, Pet. App. xxxiv-xxxv (addressing Active's potential trial strategy).

Active now asserts that it "withheld its RICO claims" from the state court action without any objection by Hoffman. Pet. 35. Hoffman never acquiesced to Active's splitting of its claims against it. To the contrary, Hoffman told Active that all of Active's claims could be brought in the Alaska state court action. 969 F.2d at 798. *See also* Pet. App. liv ("11. In a series of letters, Hoffman and Active agreed to permit Active to bring all of its claims against Hoffman under the subcontract on the Alaska Superior Court action, rather than assert paragraph XV(b) claims in one forum and paragraph XV(d) claims in another."). Based on that assurance, Active told Hoffman that it would prepare pleadings to bring "all of its monetary claims of Active against Hoffman in the Alaska state court." *Id.; see also* Appendix liv, ¶ 12. Active further informed Hoffman that it would dismiss its arbitration demand as soon as Hoffman assured Active that it would not change its position that "all claims against it may be tried in state court." *Id.* Active then, in December of 1985, brought its claims in state court and later withdrew its demand for arbitration. By the time it brought its claims in state court, Active's federal court action had been dismissed for nearly six months. *See* 969 F.2d at 798.

Hoffman had no reason nor obligation to believe that Active had not then brought *all* of its claims in the Alaska state court.

Active asserts that the Ninth Circuit incorrectly decided that Hoffman was prejudiced because Active did not receive all of the monetary judgment against Hoffman, some portion going instead to pay Active's lawyers and experts. It was not inappropriate for the court of appeals to consider the final judgment in determining whether Hoffman had been prejudiced. As Active concedes, both sides spent enormous funds in the state court litigation. The court need not evaluate how successful Active was in its state court litigation to find that litigation of arbitrable issues to final judgment was prejudicial to Hoffman.

The further suggestion that Hoffman was not prejudiced since its subcontract with Active envisioned bifurcated litigation is inaccurate. The subcontract required subcontractor claims against the owner to be made according to the owner's dispute resolution procedures in the Hoffman/Owner contract, namely, litigation. Subcontract, XV(b) (Pet. App. cx); *see also* Pet. App. li. The subcontract provides that claims by Active against Hoffman were arbitrable. *Id.* Hoffman did not agree to defend claims against it in separate proceedings. Quite the contrary, Hoffman limited remedies against it to one forum. *See* 969 F.2d at 799.

Finally, Active asserts that the Ninth Circuit's result is contrary to the decision in *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Liberal rules of pleading are not at issue in this case. Active was told by

the district court it had a right to arbitrate RICO claims against Hoffman. Active agreed to bring *all* of its arbitrable claims against Hoffman in state court litigation. Active sued both Hoffman and the owner's architects in state court. The Ninth Circuit Court of Appeals correctly determined that Active waived its right to demand arbitration in favor of litigation in the state court.

As the foregoing discussion illustrates, this case involves the construction of an agreement by the parties to join all of the subcontractor's claims in one forum. The decision is the correct interpretation of the facts of that agreement. No important federal questions are raised by the decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 8, 1993.

Respectively submitted,

MICHAEL E. KREGER
Respondent's Attorney